

JAN 30 1980

TAX DIVISION

SI RIOR COURT OF THE DISTRICT

Opinion
No. 1194

FILED

COLUMBIA REALTY VENTURE :

Petitioner :

v. : Docket No. 2598

DISTRICT OF COLUMBIA :

Respondent :

ORDER

Upon consideration of the Motion for Summary Judgment filed herein by petitioner, the Motion for Summary Judgment filed herein by respondent, the accompanying Statements of Material Facts as to where there is no Genuine Issue, the Memorandum of Points and Authorities in Support of the Motions for Summary Judgment, and the pleadings, admissions and exhibits on file herein, it is by the Court this 29th day of January, 1980,

ORDERED: That respondent's Motion for Summary Judgment be and the same hereby is, granted, and it is
FURTHER ORDERED: That petitioner's Motion for Summary Judgment be, and the same hereby is, denied, and it is

FURTHER ORDERED: That judgment be, and the same hereby is, entered in favor of respondent.


JUDGE JOHN D. FAWCETT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

JOSEPH M. BUR
CLERK OF
SUPERIOR COURT OF
DISTRICT OF COLUMBIA
TAX DIVISION

JAN 30 1980

COLUMBIA REALTY VENTURE :
Petitioner :
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DISTRICT OF COLUMBIA :
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACTS

1. Petitioner Columbia Realty Venture (the Venture) is a limited partnership formed under the Limited Partnership Act of the District of Columbia, pursuant to an agreement of limited partnership dated August 13, 1974. (Prospectus p.4).

2. Respondent District of Columbia is a municipal corporation authorized to sue and to be sued in its own name.

3. Columbia Realty Trust (the Trust) was a trust whose beneficiaries held transferable shares evidencing their interests in the organization. It was organized on April 26, 1962 in the District of Columbia for the purpose of owning and managing real property. (Prospectus p.4 and Petitioner at 5a).

4. Section 1.1 of the Declaration of Trust of the Trust provided as follows:

"The Trust shall be designated as Columbia Realty Trust, in which name the trustees may conduct business, make and execute deeds, mortgages, leases, contracts and other instruments, acquire mortgage, lease, convey and transfer real estate or other property, and sue and be sued."

Pursuant to Section 1.4 of the Declaration of Trust the trustees were authorized to "elect from time to time to

qualify the Trust as a 'real estate investment trust' under paragraph 2 of subchapter m of chapter 1 of the Internal Revenue Code of 1954."

5. Section 4.1 of the Declaration of Trust provided in paragraph (a) that the initial trustees were three (3) in number, namely Messrs. Duty, Bernstein and Zeldon. Pursuant to Section 4.6 of the Article the trustees

"... or any one or more of them, shall hold legal title to all property belonging to the Trust on behalf of the Trust. The trustees shall have absolute and exclusive control, management and disposition of the property of the Trust, and absolute and exclusive control over the management and conduct of the business and affairs of the Trust, free from any power or control on the part of the shareholders, in the same manner as if they were the absolute owners thereof, ..."

Pursuant to 4.7 of the Article the trustees were empowered under paragraph 4 thereof "To hold legal title to property of the Trust in the name of the Trust ..."

6. On December 17, 1974, the shareholders of the Trust voted to conduct the Trusts' business in the form of a Limited Partnership and adopted an "Agreement and Plan of Reorganization and Liquidation" to accomplish this change. Under the terms of this agreement, petitioner on January 23, 1975 acquired all the assets of the trust and assumed all of its liabilities in exchange for partnership interests in the Venture. On the same day the Trust was dissolved.

7. Pursuant to representations made to the Internal Revenue Service by the Trust, the Internal Revenue Service, by letter dated May 31, 1974, in ruling upon an aspect of the transaction described in paragraph 6 hereof, stated as follows:

"Columbia was formed as a business trust in order to allow for the possibility of qualifying as a real estate investment trust. Columbia, however, has never qualified as a real estate investment trust. Since Columbia is

subject to 'double taxation', the trustees of Columbia have decided, subject to certain conditions, to submit to the vote of the Class A shareholders a plan whereby a newly formed limited partnership, Columbia Realty Venture ("Venture"), will hold the assets and liabilities of Columbia. In order to ensure that the transfer of assets to Venture and the subsequent liquidation are acceptable to the shareholders, the trustees of Columbia intend to amend Columbia's Declaration of Trust to provide that the holders of the Class A shares be entitled to vote on the plan of liquidation. In addition, to minimize conflicts of interest, the trustees intend that the approval of the plan of liquidation require the vote of 87% of the Class A shares of Columbia, or approximately 2/3 of the stock not held directly or indirectly by Norman Bernstein.

"Accordingly, it is proposed that Columbia transfer its assets, except cash to be used to pay non-electing shareholders and other expenses of liquidation and liabilities to Venture in exchange for a limited partnership interest in Venture. Columbia will then be completely liquidated and all of its assets, consisting of the Venture interest, will be distributed pro rata to the Columbia shareholders in one calendar month in complete cancellation of all of their stock, except that a Columbia shareholder may elect to receive cash rather than a limited partnership interest in Venture. The election to receive either cash or a limited partnership interest must be made with respect to all of a shareholder's share, so that no shareholder will receive both cash and a limited partnership interest on liquidation."

8. Assets of the Trust included interests in mortgages and leaseholds or interests therein. All of the trust real property investments are primarily in the Washington, D.C. metropolitan area, although their trust was not restricted to investments in the area. (Prospectus page 42). Specifically, the trust holdings included apartments in Washington, D.C., Falls Church, Virginia and Annapolis, Maryland, a garage in Washington, D.C., boat slips in Annapolis, Maryland, a shopping center in Bethesda, Maryland, as well as two shopping centers in Prince Georges County, Maryland, warehouse in Prince Georges, Maryland and two sites for future construction in Washington, D.C. (Prospectus page 45).

9. One individual, Norman Bernstein, was the preside, a trustee and the principal shareholder of the trust. Mr. Bernstein owned 30.8% of the Class A Beneficial trust interest, and 68.5% of the Class A Special Shares of Beneficial interest, while 31.5% of the remaining Class A Special Trust Interests were held in trust for Mr. Bernstein's children.

10. As of the date of consummation of the transaction between the Trust and the Venture, the following interests in the trust were outstanding:

a. There were 529,588 shares of Class A beneficial interests held by 265 individuals;

b. Norman Bernstein owned 163,210 or 30.8% of the above interest;

c. Trusts for the benefit of Mr. Bernstein's six children owned 32,250 or 6.1% of the Class A shares.

d. There were outstanding 126,193.75 Class A Special Shares, 68.5% of which were owned by Norman Bernstein and 31.5% which were held in trust for his children.

e. Of the Class A shareholders, 19 controlled 80% of the shares.

11. The trustees of the trust at the time of the transaction were: Joseph Borkin, Seymour Kaufman, James E. Artis, Norman Bernstein, G.G. Cuty and Louis Zeldon. The general partners of the Venture were Joseph Borkin, Seymour Kaufman, Norman Bernstein, Louis Zeldon, James R. Connell and Diane Bernstein. Thus 33.3% of the Trustees did not continue to hold title to the property conveyed by the deeds to petitioner.

12. At the time of the transaction, 99 of the 265 shareholders of the trust elected to receive cash (\$574,337.50) for their interest in the Trust, thereby declining to participate in the Venture. These share-

holders held 45,947 or 7.007% of the 655,691.75 outstanding shares of the Trust. The remaining shareholders of the Trust became partners in the Venture.

13. On January 23, 1975, the Trust executed 12 deeds conveying all right, title and interest to various parcels of real property in the District of Columbia to petitioner, the Venture.

14. On January 31, 1975, petitioner recorded these 12 deeds with the Recorder of Deeds of the District of Columbia and claimed an exemption from the District of Columbia Deed Recordation Tax under D.C. Code, (1973 ed.) §47-722(6) for the reason that each deed "has been prepared simply to confirm the conversion of Columbia Realty Trust into a limited partnership."

15. On January 24, 1977, respondent denied the exemption and assessed a recordation tax on the 12 deeds in the amount of \$73,006.32 together with interest in the amount of \$9,125.79.

16. Petitioner protested the assessment and was afforded a conference on the assessment with representatives of the Department of Finance and Revenue which was held on May 18, 1977. By letter dated October 18, 1977, the Department of Finance and Revenue notified petitioner that the recordation of the deeds in question were subject to the tax. The letter included a deficiency bill in the amount of \$73,006.32.

17. On April 13, 1978 petitioner paid the \$73,006.32 recordation tax plus \$2,190.18 in interest.

18. Deeds transferring title to the Trust's Maryland real estate from the Trust to petitioner were recorded in Anne Arundel, Montgomery and Prince George's Counties. These deeds were accepted for recording without the payment of any recordation tax. The appropriate Maryland authorities did not act affirmatively to exempt the deeds in question from the tax or to issue any written

determination to that effect.

Each of the above deeds was captioned "Confirmatory Deed," and each deed contained the following recitations:

"AND WHEREAS, pursuant to an 'Agreement and Plan of Reorganization and Liquidation' dated August 14, 1974, filed with the Securities & Exchange Commission, Columbia Realty Trust is being dissolved, and in liquidation and distribution thereof the beneficial shareholders of the Trust are receiving Limited Partnership Interests in the Venture in proportion to the number of Trust shares held by them, to the end that Columbia Realty Trust will cease to exist, and by the terms of the said Reorganization Agreement all of its assets are owned by and all of its liabilities assumed by Columbia Realty Venture, the beneficial owners of which immediately after closing were the same as the beneficial owners of Columbia Realty Trust immediately prior to closing;"

"AND WHEREAS, for purposes of real estate assessments, taxation and evidence of record title, it is desirable and advisable by this Deed to confirm ownership of the hereinafter described property in the surviving entity, Columbia Realty Venture, a limited partnership."

19. Deeds transferring title to the Virginia real estate from the Trust to petitioner were recorded in the City of Alexandria and Fairfax County. These deeds were accepted for recording without the payment of any recordation tax. The appropriate Virginia authorities did not issue a written determination that these deeds were exempt from the tax. Each deed contained a certification by the Trustees of the Trust "that the transfer made herein is pursuant to a liquidation of Columbia Realty Trust, and that Columbia Realty Venture, a Limited Partnership, consists of the shareholders of Columbia Realty Trust which is being liquidated." The backing of each deed contained in the following: "Note to Recording Clerk: The transfer being made on the attached document is pursuant to the liquidation of the grantor and is being made to and for the benefit of the shareholders thereof."

20. By letter, dated May 31, 1974, the Internal Revenue Service ruled that the Transaction was, in part,

for Federal income tax purposes, a liquidation of the trust.

CONCLUSIONS OF LAW

1. Under D.C. Code, (1973 ed.), §45-723, a deed recordation tax is imposed "on each deed at the time it is submitted to the Commissioner [Mayor] for recordation." The tax is based on the consideration for the deed.^{1/} D.C. Code, 1973 ed., §45-721(e) provides as follows:

"(e) The word consideration, except as otherwise provided in section 45-724 of this subchapter, means the price or amount actually paid or required to be paid, for real property including any mortgages, liens or encumbrances thereon."

2. Exemptions from taxation must be strictly construed. District of Columbia v. Mt. Vernon Seminary, 69 App.D.C. 251, 100 F.2d 116 (1938). Conference of Major Religious Superiors of Women, Inc. v. District of Columbia, 121 U.S. App. D.C. 171, 348 F.2d 783 (1965); Hebrew Home for the Aged v. District of Columbia, 79 U.S. App.D.C. 64, 142 F.2d 573 (1944).

3. The trustees of Columbia Realty Trust conveyed certain District real property subject to various mortgages, liens, and encumbrances, to petitioner in exchange for partnership interests in the Venture.^{2/} These valuable partnership interests transferred by petitioner to the trust and the existing mortgages, liens and encumbrances assumed by petitioner from the trustees constitute consideration for the deeds within the meaning of §45-721(e).

^{1/} The tax previously was set at a rate of 1/2 of 1% of the consideration for the deeds in question here. The rate was increased subsequent to the recording dates here to 1% of the consideration. See D.C. Law 1-23, title II, §203, 22 D.C.R. 2097.

^{2/} These interests were then distributed to those beneficiaries of the trust who did not elect out of the transaction in return for cash.

See Article 1 of the "Agreement and Plan of Reorganization and Liquidation" dated August 14, 1974 entitled "Transfer of Assets, Consideration for Transfer and Distribution" at pp. A-1 of the Prospectus, dated November 22, 1974 (this Prospectus appears as Exhibit A to Petitioner's Answers to Respondent's Interrogatories); see also District of Columbia v. Orleans, 132 U.S.App.D.C. 139, 406 F.2d 957, footnote 3 at 958.

4. The deeds recorded by petitioner do not fall within the exemption provided for by D.C. Code 1973, §45-722(6). Section 45-722(6) reads as follows:

"Deeds which, without additional consideration confirm, correct, modify or supplement a deed previously recorded."

a. The deeds are supported by consideration; therefore, they cannot satisfy that part of the section exempting deeds recorded "without additional consideration."

b. A confirmatory deed has a specific, well-defined legal meaning. It is a conveyance to a party having possession or an existing estate in the property covered by the deed. Monroe v. Whitney, 95 U.S. 551, 24 L.Ed 456 (1877). It operates to release the grantee from all claims of the grantor against the property. See 23 AmJur.2d Deeds §18. In this case, petitioner neither had title, possession or any estate in the land it received from the trustees prior to execution of the deeds in question. The very purpose of these deeds was to convey all incidents of ownership in the subject real estate to petitioner. As a matter of law, the deeds are not confirmatory deeds. Petitioner does not claim that these deeds are corrective deeds or deeds which modify or supplement prior deeds. Even if such claim had been made, they do not meet the requirements of corrective, modifying or supplementary deeds as a matter of law. See e.g.

5. Columbia Realty Trust was formed as a trust. Although, it was treated for Federal income tax purposes as a corporation, (see Treas. Reg. §301.7701(a)), it was not chartered as a corporation in the District of Columbia and thus, cannot be legally recognized as a corporation. It must be recognized as a trust. See D.C. Code 1973 ed., §29-921c; Robertson v. Levy, 197 A.2d 443 (D.C.App. 1964). As a trust its trustees (who are authorized by the trust agreement to manage the trust affairs and property) hold legal title to the property while the trust beneficiaries or shareholders hold beneficial title to such property. D.C. Code, 1973 ed., §45-1201; see also Seymour v. Freer, 75 U.S. 202 (1868). On the other hand, Columbia Realty Venture was formed as a limited partnership. Under the Uniform Limited Partnership Act, D.C. Code, 1973 ed., §41-409, all general partners hold legal and equitable title to all property of the partnership as "tenants in partnership." D.C. Code, 1973 ed., §41-324(1). The rights of limited partners are limited to an interest in partnership profits and a return of their respective contributions upon dissolution. D.C. Code, 1973 ed., §41-410(2). Their interest in the partnership is an interest in personal property and not real property. See D.C. Code, 1973 ed., §41-418. The legal distinction between these two organizations has been described as follows:

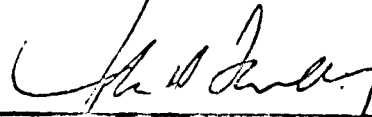
"A partnership is distinguished from a trust relationship in that the former involves co-ownership while the latter involves representative ownership. [Citations Omitted] "59 AmJur.2d Partnership §14.

Thus, the deeds in question operated to transform one form of ownership into a very different form.

6. Petitioner itself has admitted the significant legal and economic differences between the two types of entities in a section of the prospectus entitled "Certain Significant Differences Between Being a Security Holder of the Trust and Being a Partner of the Venture". See pp. 30 of the Prospectus. The differences outlined by petitioners fall into the following categories: (1) transferability of interest, (2) liability, (3) taxation, (4) distributions, (5) meeting and control of management and (6) conflicts of interest.

Based upon the foregoing, this Court concludes that respondent is entitled to a judgment in its favor against petitioner.

January 29, 1980


JOHN D. MONTLEROY
JUDGE